Supreme Court, U.S.
FILED
JUL 25 1991
OFFICE OF THE CLERK

(2)

No. 90-1959

IN THE

Supreme Court of the United States

October Term, 1990

WINDSOR HOUSE, INC.,

Petitioner,

vs.

GRANT THORNTON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RICHARD R. NELSON, II
Counsel of Record
NEIL F. SIEGEL
COHEN & GRIGSBY, A Professional Corporation
2900 CNG Tower
625 Liberty Avenue
Pittsburgh, Pennsylvania 15219
(412) 394-4900
Attorneys for Respondent Grant Thornton

Batavia Times Publishing Co.
Harold L. Berkobee
Pittsburgh, Pa. (412) 881-7463

15

QUESTION PRESENTED

Whether the General Assembly of the State of Ohio may enact a four-year tort statute of limitations, without a discovery rule, consistent with the Equal Protection and Due Process clauses of the Fourteenth Amendment to the United States Constitution?

TABLE OF CONTENTS.

	Page
Question Presented	i
Table Of Authorities	iv
Statement Of The Case	2
Summary Of Reasons For Denying The Writ	4
Reasons For Denying The Writ	5
A. The Questions Presented In The Petition Were Not Addressed By The Court Below	5
B. State Statutes Of Limitations Involve Matters Of State Concern And Do Not Implicate Important Federal Questions	6
C. Windsor House Was Not Denied Equal Protection	7
D. Windsor House Was Accorded Due Process	9
Conclusion	11

TABLE OF AUTHORITIES.

Page

Cases:

Chevron Oil Company v. Huson, 404 U.S. 97 (1971) 9,10

City of Springfield, Massachusetts v. Lois Thursten Kibbe, 480 U.S. 257 (1987) 5

Clark v. Jeter, 486 U.S. 456 (1988) 7

Investors REIT One v. Jacobs, 46 Ohio St. 3d 176 (1989) ..... *passim*

James B. Beam Distilling Company v. Georgia, _____ U.S. _____, 59 U.S.L.W. 4735 (1991) 9

Kunz v. Buckeye Union Ins. Co., 1 Ohio St. 3d 79 (1982) 7,8

Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, _____ U.S. _____, 59 U.S.L.W. 4688 (1991) 8

Richard v. Staehle, 70 O. App. 2d 93 (1980) 9

Sladkey v. Lomax, 43 O. App. 3d 4 (1988) 10

State ex rel. Local Union 377 v. Youngstown, 50 Ohio St. 2d 200 (1977) 7,8

Sun Oil Company v. Wortman, 486 U.S. 717 (1988) .. 7

Tulsa Collection Servs. v. Pope, 485 U.S. 478 (1988) . 7

Statute:

Ohio Rev. Code Ann. §2305.09(D) ..... *passim*

Rules:

Supreme Court Rule 10.1 5

Supreme Court Rule 15.1 10

IN THE

Supreme Court of the United States

October Term, 1990

No. 90-1959

WINDSOR HOUSE, INC.,

Petitioner,

vs.

GRANT THORNTON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Grant Thornton, respectfully requests that this Court deny the Petition for Writ of Certiorari which seeks review of the Supreme Court of Ohio's opinion in this case. That opinion is reported at 57 Ohio St. 3d 158 (1991).

STATEMENT OF THE CASE

On October 31, 1985, Grant Thornton instituted an action in an Ohio state court seeking to recover from Windsor House $12,700 in unpaid accounting fees.

On January 30, 1986, Windsor House filed a counterclaim, contending that, in connection with a deficiency assessment made by the State of Ohio against Windsor House in 1982, Grant Thornton had committed accounting negligence in the performance of auditing services for the State of Ohio in 1980.

Grant Thornton moved for summary judgment on the accounting negligence causes of action in the counterclaim, arguing that the four year statute of limitations contained in Ohio Rev. Code Ann. §2305.09(D) barred such claims.

On February 11, 1991, the Supreme Court of Ohio, relying on a decision rendered while the instant case was on appeal, *Investors REIT One v. Jacobs,* 46 Ohio St. 3d 176 (1989), ruled that Windsor House's accounting negligence claims were untimely. The court reasoned that the statute of limitations set forth at Ohio Rev. Code Ann. §2305.09(D) applies to claims for accounting negligence and no "discovery rule" tolls that statute. (Pet. App. at 6a-7a).

On or about June 25, 1991, Windsor House filed a Petition for Writ of Certiorari, urging this Court to review the Supreme Court of Ohio's decision that no discovery rule attends Ohio Rev. Code Ann. §2305.09(D).

In the Petition, Windsor House argues that this case implicates both the Equal Protection and Due Process clauses of the Fourteenth Amendment to the United States Constitution. Windsor House reasons that it was denied equal protection of the laws since Ohio Rev. Code Ann. §2305.09(D) treats similarly situated tort claimants differently, and, because *Investors* was applied to the case at bar, that it was denied due process.

SUMMARY OF REASONS FOR DENYING THE WRIT

Windsor House's petition must be denied for the following reasons: (i) The constitutional issues raised in the Petition neither were briefed, argued nor addressed by the court below, (ii) issues involving state statutes of limitations are of state concern and do not raise any important federal or constitutional questions, (iii) Windsor House was not denied equal protection, and (iv) Windsor House was accorded due process.

REASONS FOR DENYING THE WRIT

A. The Questions Presented In The Petition Were Not Addressed By The Court Below.

In its brief below, Windsor House urged the Supreme Court of Ohio to reverse *Investors* and to read a discovery rule into Ohio Rev. Code Ann. §2305.09(D). In the alternative, Windsor House argued that *Investors* should not be applied to the case at bar. However, at no time, neither at the trial, appellate nor state supreme court level, did Windsor House advance arguments based upon the Equal Protection or Due Process clauses of the Fourteenth Amendment.

Supreme Court Rule 10.1 provides that:

> A petition for writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:
>
> * * *
>
> (c) When a state court ... has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

Supreme Court Rule 10.1(c). A review of the decision below, and of the *Investors* opinion, makes clear that no question of federal law (important or otherwise) was decided by the Supreme Court of Ohio. Nor does Windsor House cite in its Petition a single decision of this Court with which the Supreme Court of Ohio's decision conflicts. Accordingly, the Petition should be denied. *City of Springfield, Massachusetts v. Lois Thursten Kibbe,* 480 U.S. 257, 259 (1987) ("We ordinarily will not decide questions not raised or litigated in the lower courts").

B. State Statutes of Limitations Involve Matters of State Concern And Do Not Implicate Important Federal Questions.

In the decision below, and in *Investors,* the Supreme Court of Ohio performed a traditional judicial function and interpreted the language of a legislative enactment, *i.e.,* Ohio Rev. Code Ann. §2305.09. In holding that no discovery rule attends subsection (D) of that statute, the Supreme Court of Ohio examined the language and structure of the statute as a whole:

> An action for any of the following causes shall be brought within four years after the cause thereof accrued:
>
> (A) For trespassing upon real property;
>
> (B) For the recovery of personal property, or not taking or detaining it;
>
> (C) For relief on the grounds of fraud;
>
> (D) For an injury to the rights of the plaintiff not arising on contract nor enumerated in sections 2305.10 to 2305.12, inclusive, 2305.14 and 1304.29 of the Revised Code.
>
> If the action is for trespassing under ground or injury to mines, or for the wrongful taking of personal property, the causes thereof shall not accrue until the wrongdoer is discovered; nor, if it is for fraud, until the fraud is discovered.

Ohio Rev. Code Ann. §2305.09. The court reasoned that, since the Ohio legislature had included a discovery rule for, among others, fraud claims, under the principle of *expressio unius est exclusio alterius,* the necessary implication was that no discovery rule existed for general tort claims which are covered by subsection (D), including claims for accounting negligence. *Investors,* 46 Ohio St. 3d at 181.

Windsor House's complaint, then, is not with the Supreme Court of Ohio, which simply interpreted a statute, but with Ohio's General Assembly which passed a statute of limitations without a discovery rule. This Court long has recognized that statutes of limitations are matters of state concern. *Sun Oil Company v. Wortman*, 486 U.S. 717, 730 (1988) ("A State's interest in regulating the workload of its courts and in determining when a claim is too stale to be adjudicated certainly suffices to give it legislative jurisdiction to control the remedies available in the courts by imposing statutes of limitations"); *Tulsa Collection Servs. v. Pope*, 485 U.S. 478, 486 (1988) ("State's limited involvement in [passing a statute of limitations] falls short of constituting the type of state action required to implicate the protections of the Due Process clause").[1] Consequently, the Petition presents no question of sufficient federal or constitutional import to warrant issuance of a writ of certiorari.

C. Windsor House Was Not Denied Equal Protection.

Windsor House's contention (Pet. at 6-10) that the decision below and *Investors* treat similarly situated tort claimants differently cannot be accepted. In support of its contention (Pet. at 9-10), Windsor House cites *Kunz v. Buckeye Union Ins. Co.*, 1 Ohio St. 3d 79 (1982) and *State ex rel. Local Union 377 v. Youngstown*, 50 Ohio St. 2d 200 (1977) for the proposition that, except for accounting

---

[1] This is not a case like *Clark v. Jeter*, 486 U.S. 456 (1988), where the Court held that a state's statute of limitations which discriminated between rights of legitimate children and children born out of wedlock implicated the Equal Protection clause since children born out of wedlock fall into a class accorded special constitutional protection. Windsor House does not contend, and never has contended, that accountants or nursing homes fall into a protected class.

negligence claims, a discovery rule does attend Ohio Rev. Code Ann. §2305.09(D). Windsor House has misread the cited authorities.

In *Kunz*, the Supreme Court of Ohio determined what were the elements of a cause of action for negligent procurement of insurance, holding the tort established when a loss of uninsured property is sustained. 1 Ohio St. 3d at 81-82. *Kunz* did not address any discovery rule issue.[2] *Local Union 377* (and the other cases cited by Windsor House in the equal protection portion of its Petition) does not construe Ohio Rev. Code Ann. §2305.09(D) in any way and provides no support for the cited proposition.

Windsor House's equal protection argument, then, rests on a misreading of both Ohio Rev. Code Ann. §2305.09(D) and the cases which have (or have not) construed that section. This Court should not grant certiorari based on Windsor House's misreadings.[3] In holding that no discovery rule attends Ohio Rev. Ann. §2305.09(D), the Supreme Court of Ohio interpreted the statute in a manner which treats similarly situated claimants similarly. Any person with a general tort claim must bring the claim within four years after the cause of action accrues, not within four years of when the person discovered or reasonably should have discovered that the cause of action accrued.

---

[2] Moreover, even if *Kunz* did hold that a discovery rule attended Ohio Rev. Code Ann. §2305.09(D), which it did not, the logical conclusion is not that Windsor House has been denied equal protection, but that *Kunz* was overruled by *Investors* and the decision below.

[3] Significantly, in the week before Windsor House filed its Petition, this Court recognized that different causes of action may have associated with them different statutes of limitations. *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, _____ U.S. _____, 59 U.S.L.W. 4688, 4689 n. 1 (1991). Moreover, in *Lampf*, this Court held that a three-year statute of repose was an appropriate limit upon actions for securities fraud. *Id.* at 4691. If a three-year statute of repose passes muster before this Court, so must a four-year statute.

D. Windsor House Was Accorded Due Process.

Windsor House claims it was denied due process of law since the Supreme Court of Ohio applied *Investors* "retroactively" in holding that its accounting negligence claims against Grant Thornton were time-barred, thereby denying it a reasonable opportunity to press its claims. In support of its contention, Windsor House cites this Court's opinion in *Chevron Oil Company v. Huson*, 404 U.S. 97 (1971).

Windsor House's due process claim cannot be accepted, and its reliance on *Chevron* is misplaced. In *Chevron*, and most recently in *James B. Beam Distilling Company v. Georgia*, _____ U.S. _____, 59 U.S.L.W. 4735, 4737-38 (1991), this Court held that judicial pronouncements generally are applied retroactively, except where, among other things, the new pronouncement overrules clear past precedent on which litigants may have relied. 404 U.S. at 106.

In this case, there is no such clear precedent on which Windsor House could have relied. Windsor House allegedly discovered Grant Thornton's alleged negligence more than two years before the state statute of limitations ran (in 1982, when the deficiency assessment was made). Moreover, when the discovery purportedly was made, the only published appellate decision interpreting Ohio Rev. Code Ann. §2305.09(D) with regard to accounting negligence claims, *Richard v. Staehle*, 70 O. App. 2d 93 (1980), held that such claims accrue when the negligent act was committed, not when the act has or reasonably should have been discovered. Accordingly, Windsor House's contention that, when its cause of action accrued, a discovery rule attended Ohio Rev. Code Ann. §2305.09(D) (Pet. at 5, 11) simply is wrong and, indeed, is a misstatement of fact and law.

See, Supreme Court Rule 15.1. Indeed, the first case which arguably could be interpreted to read a discovery rule into Ohio Rev. Code Ann. §2305.09(D) was issued *after* Windsor House filed its counterclaim. *Sladkey v. Lomax,* 43 O. App. 3d 4 (1988). If anything, the Supreme Court of Ohio's decision in *Investors* and in this case returned the law of Ohio to what it was when Windsor House filed its counterclaim. Obviously, *Chevron* is inapposite to the case at bar, and Windsor House raises no viable due process issue.

CONCLUSION

For all of the above-stated reasons, the Petition should be denied.

Respectfully submitted,

RICHARD R. NELSON, II
Counsel of Record
NEIL F. SIEGEL
COHEN & GRIGSBY, A Professional Corporation
2900 CNG Tower
625 Liberty Avenue
Pittsburgh, Pennsylvania 15219
(412) 394-4900
Attorneys for Respondent Grant Thornton